

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

| | |
|---------------------------------|----------------------|
| TIMOTHY L. ASHFORD, TIMOTHY) | |
| L. ASHFORD, P.C.L.L.O.,) | |
| |) |
| Plaintiffs,) | 8:15CV8 |
| |) |
| v. |) |
| |) |
| DOUGLAS COUNTY, STATE OF) | MEMORANDUM AND ORDER |
| NEBRASKA, JOHN DOES, 1-1000,) | |
| JANE DOES, 1-1000, W. RUSSELL) | |
| BOWIE, In His Official) | |
| Capacity, CRAIG MCDERMOTT, In) | |
| His Official Capacity, HORACIO) | |
| WHEELOCK, Individually and) | |
| in his official capacity,) | |
| THOMAS RILEY, Individually) | |
| and in his official capacity,) | |
| DENISE FROST, Individually) | |
| and in her official capacity,) | |
| JAMES GLEASON, Individually) | |
| and in his official capacity,) | |
| TIMOTHY BURNS, Individually) | |
| and in his official capacity,) | |
| and DERICK VAUGHN,) | |
| Individually and in his) | |
| official capacity,) | |
| |) |
| Defendants.) |) |

This matter is before the Court on plaintiffs' motion for default judgment filed pursuant to Federal Rule of Civil Procedure 55(Filing No. [51](#)). The plaintiffs seek an order entering a default judgment against the State, Craig McDermott, Derick Vaughn, Russell Bowie, Timothy Burns, Tom Riley, James Gleason, and Horacio Wheelock. After reviewing the motion, and the applicable law, the Court will deny the plaintiffs' motion.

Background

The plaintiffs filed a complaint against Douglas County, the State of Nebraska, John Does, 1-1000, and Jane Does,

1-1000 on January 12, 2015 (Filing No. [1](#)). On September 1, 2015, the plaintiffs filed a Second Amended Complaint including additional defendants (Filing No. [31](#)). The plaintiffs had 120 days from the day of the filing of the Second Amended Complaint to complete service. On December 30, 2015, the deadline for serving summons, the plaintiffs filed a motion to extend the time to serve the defendants (Filing No. [34](#)). At that time, the plaintiffs had failed to file any executed summons with the Court. On January 11, 2016, the Court denied the plaintiffs' motion and dismissed the amended complaint as to all defendants (Filing No. [36](#)). On January 15, 2016, the plaintiffs filed a motion to alter or amend the judgment based on evidence that certain defendants were properly served (Filing No. [37](#)). On May 9, 2016, the Court granted the plaintiffs' motion in part, and vacated the portion of the order dismissing certain defendants who were properly served.

The plaintiffs filed a motion on February 10, 2016, asking the Court to enter a default judgment against the State, Craig McDermott, Derick Vaughn, Russell Bowie, Timothy Burns, Tom Riley, James Gleason, and Horacio Wheelock. The plaintiff claims that the defendants were properly served and have failed to plead or otherwise defend as required by Federal Rule of Civil Procedure 55. Defendants Russell Bowie, Timothy Burns, James Gleason, Craig McDermott, Thomas Riley, and Derick Vaughn filed a motion to dismiss for failure to state a claim on May 19, 2016.

Discussion

An entry of default may occur “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.” Fed. R. Civ. P.55(a). Generally, a defendant must serve an answer “within 21 days after being served with the summons and complaint.” Fed. R. Civ. P. 12(a)(1)(A)(i). “If a plaintiff fails to properly serve a defendant, however, entry of default is not warranted.” *Edmonds v. Williams*, No. 14-4535, 2015 WL 1399035, at *1 (D. Minn. March 26, 2015) (citing *Haley v. Simmons*, 529 F.2d 78,79 (8th Cir. 1976)).

The record reflects that defendants Craig McDermott, Derick Vaughn, Russell Bowie, Timothy Burns, Tom Riley, and James Gleason were timely served. Defendant Wheelock was dismissed from the case due to failure to timely serve. In addition, there is no evidence that the State of Nebraska has been properly served. The Court finds that entering a default judgment is not proper because the case was initially dismissed on January 11, 2016, and reopened on May 9, 2016. Defendants McDermott, Vaughn, Bowie, Burns, Riley, and Gleason, were served on December 31, 2015 (See Filing No. [39](#), 40, 42, 43, 44, and 45). Generally, defendants are required to file an answer within 21 days after being served, but due to the fact that the case was dismissed on January 11, 2016, the defendants had no need to file an answer after that time. The case was reopened on May 9, 2016, and Defendants Russell Bowie, Timothy Burns, James Gleason, Craig

McDermott, Thomas Riley, and Derick Vaughn filed a motion to dismiss for failure to state a claim on May 19, 2016. Therefore, the defendants have responded to plaintiffs' amended complaint within 21 days of the case being reopened. As a result, the plaintiffs' motion for default judgment will be denied.

Accordingly,

IT IS ORDERED that plaintiffs' motion for default judgment is denied.

DATED this 23rd day of May, 2016.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court